IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
December 19, 2006 Session

STATE OF TENNESSEE v. DARRIN TONI WEBB

Appeal from the Criminal Court for Hamilton County
No. 256728 Don W. Poole, Judge

No. E2006-00736-CCA-R3-CD - Filed March 5, 2007

The Defendant, Darrin Toni Webb, pled guilty in the Hamilton County Criminal Court to bribery of a public servant. Following a sentencing hearing, the trial court imposed a ten-year sentence as a Range III, persistent offender. On appeal, the Defendant argues that (1) the trial court erred in relying on Georgia convictions as prior felonies in order to classify him a Range III, persistent offender, (2) the trial court erred by ordering his sentence to be served consecutively to a prior federal sentence, and (3) his sentence amounts to cruel and unusual punishment. Although consecutive sentencing was proper and the Defendant's sentence did not amount to cruel and unusual punishment, we must nonetheless reverse and remand the case to the trial court for resentencing because the record does not support the trial court's finding that the Georgia convictions qualified as prior felonies for range classification purposes.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Reversed in Part; Remanded

DAVID H. WELLES, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JAMES CURWOOD WITT, JR., J., joined.

Howell G. Clements, Chattanooga, for the appellant, Darrin Toni Webb.

Robert E. Cooper, Jr., Attorney General and Reporter; Jennifer L. Bledsoe, Assistant Attorney General; William H. Cox, III, District Attorney General; and Neal Pinkston, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

This case arises from the Defendant's guilty plea and resulting sentence. On December 14, 2005, a Hamilton County grand jury returned an indictment against the Defendant, charging him with bribery of a public servant in violation of Tennessee Code Annotated section 39-16-102, a Class C felony.[1] The State filed a notice to seek enhanced punishment on February 28, 2006, averring that the Defendant was a persistent offender and listing the Defendant's prior convictions as follows: (1) on April 2, 2001, three counts of mail fraud in the United States District Court, Eastern District of Tennessee; (2) on December 20, 2002, three counts of commercial gambling in the Superior Court, Catoosa County, Georgia; and (3) on September 26, 2005, distribution of information relating to destructive devices and aiding and abetting extortion in the United States District Court, Eastern District of Tennessee. The State amended its notice, contending that the Defendant qualified as a career offender. Shortly thereafter, the State conceded in its sentencing memorandum that the Defendant's 2005 federal convictions could not be used for range classification purposes and that, therefore, the Defendant did not qualify as a career offender.

On March 15, 2006, the Defendant entered an "open" plea to the indictment. The following facts were stipulated at the guilty plea hearing:

> Briefly, Your Honor, this is a case from December 12th of 2003, where [the Defendant] approached a clerk with the Hamilton County General Sessions Court in regard to two traffic tickets involving an individual by the name of Richard Alexander, a gentleman that [the Defendant] knew. In exchange for getting the tickets taken care of, so to speak, or dismissed, [the Defendant] tendered money in the amount of $200 to Mr. Simcox, and that would be the factual basis for the bribery of a public servant.

The sentencing hearing immediately followed the guilty plea. A presentence report had been prepared prior to the guilty plea and was entered into evidence at the sentencing hearing. At the time of the sentencing hearing, the Defendant was forty years old and single. According to the presentence report, the Defendant "befriended a young lad that was having difficulty in school and took (Tony Holland, Jr.) into his home and helped to raise him and give him the advantages of schooling and was a role model as a supportive father." Attached to the presentence report were two letters of recommendation—one from a science teacher at Lakeview-Fort Oglethorpe Comprehensive High School and the other from the Mayor of Fort Oglethorpe, Georgia.

The second exhibit admitted at the hearing showed three federal convictions on April 2, 2001, for mail fraud—case number 1:00-CR-00077-001. The judgment form reflected a sentence

[1] Effective February 15, 2006, the offense became a Class B felony. See 2006 Tenn. Pub. Acts (1st Ex. Sess.) ch. 2 § 2. The Defendant's crimes occurred prior to the statutory amendment.

of twenty-four months for these convictions, followed by three years of supervised release. The court also imposed monetary penalties commensurate with each conviction. The sentence was later modified to fifteen months.

Exhibit three reflected three convictions on December 20, 2002, for commercial gambling in Catoosa County, Georgia, and that an effective fifteen-year sentence was imposed for these convictions. The judgment form provided that, upon the successful completion of the first five years of the Defendant's sentence, the remainder of the sentence—ten years—would be suspended and the Defendant would then be required to comply with the special conditions of probation.

The fourth exhibit evidenced that, on September 26, 2005, the Defendant pled guilty in federal case numbers 1:04-CR-186 and 1:04-CR-188 to distribution of information relating to destructive devices and aiding and abetting extortion. For these convictions, the Defendant received a sentence of forty-eight months, followed by a three-year term of supervised release.

Exhibit five reflected that, also on September 26, the Defendant's supervised release on his mail fraud convictions was revoked for four months based upon his commission of another crime. The Defendant pled guilty to this violation. This four-month sentence was to be served consecutively to his forty-eight-month sentence in case numbers 1:04-CR-186 and 1:04-CR-188.

Exhibit six was a second superseding indictment in case number 1:04-CR-188 that charged conspiracy to affect interstate commerce, aiding and abetting extortion, and three counts of mail fraud. According to the Defendant's federal defense counsel, the first indictment proceeded "solely on the teaching the destructive device charge. The other counts then got combined in the separate federal court lawsuit where the Brocks were also defendants." It was alleged in the conspiracy and mail fraud charges of the second superseding indictment that the Defendant's illegal acts began "in or about June 2001" and continued until "in or about June 2004." The indictment listed multiple dates on which the Defendant allegedly bribed the General Sessions Court Clerk of Hamilton County, including December 12, 2003—the offense date of the conviction at issue in this appeal. Federal defense counsel also testified that he was provided discovery that related to the December 12th offense during the prosecution of the federal charges. Ultimately, the Defendant pled guilty to aiding and abetting extortion—offense date September 6, 2003—and the remaining charges were dismissed. Federal defense counsel testified that the extortion charge is "the same as bribing a public official[.]"

At the conclusion of the sentencing hearing, the trial court found that the Defendant was a Range III, persistent offender and imposed a sentence of ten years—the minimum sentence in the persistent offender range for a Class C felony. The trial court further ordered that this ten-year sentence was to be served consecutively to the Defendant's prior federal sentence for distribution of information relating to destructive devices and aiding and abetting extortion. It is from the sentencing decision of the Hamilton County Criminal Court that the Defendant appeals.

Analysis

I. Standard of Review

Before a trial court imposes a sentence upon a convicted criminal defendant, it must consider (a) the evidence adduced at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) evidence and information offered by the parties on the enhancement and mitigating factors set forth in Tennessee Code Annotated sections 40-35-113 and 40-35-114; and (f) any statement the defendant wishes to make in the defendant's own behalf about sentencing. See Tenn. Code Ann. § 40-35-210(b);[2] State v. Imfeld, 70 S.W.3d 698, 704 (Tenn. 2002). To facilitate appellate review, the trial court is required to place on the record its reasons for imposing the specific sentence, including the identification of the mitigating and enhancement factors found, the specific facts supporting each enhancement factor found, and the method by which the mitigating and enhancement factors have been evaluated and balanced in determining the sentence. See State v. Samuels, 44 S.W.3d 489, 492 (Tenn. 2001).

Upon a challenge to the sentence imposed, this court has a duty to conduct a de novo review of the sentence with a presumption that the determinations made by the trial court are correct. See Tenn. Code Ann. § 40-35-401(d). However, this presumption "is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). If our review reflects that the trial court followed the statutory sentencing procedure, that the court imposed a lawful sentence after having given due consideration and proper weight to the factors and principles set out under the sentencing law, and that the trial court's findings of fact are adequately supported by the record, then the presumption is applicable, and we may not modify the sentence even if we would have preferred a different result. See State v. Fletcher, 805 S.W. 2d 785, 789 (Tenn. Crim. App. 1991). We will uphold the sentence imposed by the trial court if (1) the sentence complies with the purposes and principles of the 1989 Sentencing Act and (2) the trial court's findings are adequately supported by the record. See State v. Arnett, 49 S.W.3d 250, 257 (Tenn. 2001). The burden of showing that a sentence is improper is upon the appealing party. See Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments; Arnett, 49 S.W.3d at 257.

II. Range Classification

First, the Defendant argues that the trial court improperly sentenced him as a Range III, persistent offender. At the sentencing hearing, the trial court considered certified judgments from the United States District Court, Eastern District of Tennessee, for three counts of mail fraud, and from Catoosa County, Georgia, for three counts of commercial gambling, as evidence that the Defendant had the prior felony convictions necessary to justify his classification as a Range III, persistent offender. The Defendant admits that his three federal convictions for mail fraud qualify

[2] We note that the legislature has recently amended several provisions of the Criminal Sentencing Reform Act of 1989, said changes becoming effective June 7, 2005. However, the Defendant's crime in this case occurred prior to June 7, 2005, and the Defendant did not elect to be sentenced under the provisions of the Act by executing a waiver of his ex post facto protections. See 2005 Tenn. Pub. Acts ch. 353 § 18. Therefore, this case is not affected by the 2005 amendments, and the statutes cited in this opinion are those that were in effect at the time the instant crimes were committed.

as prior felonies for purposes of range classification[3] but argues that the trial court should not have considered his three commercial gambling convictions in Georgia as prior felonies for sentencing purposes. At oral argument before this Court, the State conceded that the Defendant's Georgia convictions for sentencing purposes did not qualify for range classification purposes.

A trial court may sentence a defendant as a Range III, persistent offender when it finds beyond a reasonable doubt that the defendant is a persistent offender. Tenn. Code Ann. § 40-35-107(c). As applicable in this case, a persistent offender is defined as a defendant who has received "[a]ny combination of five (5) or more prior felony convictions within the conviction class or higher, or within the next two (2) lower felony classes . . . ." Id. at (a)(1). Furthermore, prior convictions include

> convictions under the laws of any other state, government or country which, if committed in this state, would have constituted an offense cognizable by the laws of this state. In the event that a felony from a jurisdiction other than Tennessee is not

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[3] At the sentencing hearing, the State contended that the analogous felony for federal mail fraud was Tennessee Code Annotated section 39-14-133, titled "False or Fraudulent Insurance Claims." The Defendant was convicted of three counts of federal mail fraud—offense dates August 29, 1996, September 29, 1996, and July 25, 1997—pursuant to section 1341 of title 18 of the United States Code. Section 1341 provided as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Tennessee Code Annotated section 39-14-133 provides as follows:

> Any person who intentionally presents or causes to be presented a false or fraudulent claim, or any proof in support of such claim, for the payment of a loss, or other benefits, upon any contract of insurance coverage, or automobile comprehensive or collision insurance, or certificate of such insurance or prepares, makes or subscribes to a false or fraudulent account, certificate, affidavit or proof of loss, or other documents or writing, with intent that the same may be presented or used in support of such claim, is punished as in the case of theft.

The amount of restitution ordered for each of the Defendant's three mail fraud convictions was $10,000 or more—a Class C felony if graded as theft. See Tenn. Code Ann. § 39-14-105.

> a named felony in this state, the elements of the offense shall be used by the Tennessee court to determine what classification the offense is given.

Id. at (b)(5). The appropriate analysis of prior out-of-state convictions is under Tennessee law as it existed at the time of the out-of-state conviction. State v. Brooks, 968 S.W.2d 312, 313-14 (Tenn. Crim. App. 1997). The State has the burden of proving beyond a reasonable doubt the requisite number of prior felonies to establish a defendant's sentencing range. State v. Jasper L. Vick, No. W2005-00467-CCA-R3-CD, 2006 WL 722173, at *9 (Tenn. Crim. App., Jackson, Mar. 22, 2006) (citation omitted).

Commercial gambling is not a named felony in Tennessee. Therefore, in order to utilize the Defendant's Georgia convictions for commercial gambling as prior felonies for sentencing, the trial court was required to analyze the elements of the Georgia offense to determine whether it was analogous to a felony offense under Tennessee law at the time. In its analysis of the commercial gambling convictions, the trial court stated as follows:

> The gambling counts, they were treated in Georgia as felonies, they carry over one year as punishment. The closest thing akin to that would be professional gambling in the State of Tennessee, which are, in fact, class E felonies and they're within two levels of the bribery count to which [the Defendant] pleads guilty to.

The Defendant's commercial gambling convictions were based on violations of Georgia Code section 16-12-22. This statute provides as follows:

> (a) A person commits the offense of commercial gambling when he intentionally does any of the following acts:
>
> (1) Operates or participates in the earnings of a gambling place;
>
> (2) Receives, records, or forwards a bet or offer to bet;
>
> (3) For gain, becomes a custodian of anything of value bet or offered to be bet;
>
> (4) Contracts to have or give himself or another the option to buy or sell or contracts to buy or sell at a future time any gain or other commodity whatsoever or any stock or security of any company, when it is at the time of making such contract intended by both parties thereto that the contract to buy or sell, the option whenever exercised or the contract resulting therefrom, shall be settled not by the receipt or delivery of such property but by the payment only of differences in prices thereof;

(5) Sells chances upon the partial or final result of or upon the margin of victory in any game or contest or upon the performance of any participant in any game or contest or upon the result of any political nomination, appointment, or election or upon the degree of success of any nominee, appointee, or candidate;

(6) Sets up or promotes any lottery, sells or offers to sell, or knowingly possesses for transfer or transfers any card, stub, ticket, check, or other device designed to serve as evidence of participation in any lottery; or

(7) Conducts, advertises, operates, sets up, or promotes a bingo game without having a valid license to operate a bingo game as provided by law.

(b) A person who commits the offense of commercial gambling shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than five years or by a fine not to exceed $20,000.00, or both.[4]

Ga. Code Ann. § 16-12-22. The Defendant was indicted for three counts of commercial gambling under subsection (a)(1)—operating and participating in the earnings of a gambling place—offense dates March 1, 2000, March 3, 2000, and April 13, 2001. The trial court concluded that the crime of commercial gambling was analogous to the Tennessee crime of "professional gambling." However, the crime of professional gambling, former Tennessee Code Annotated section 39-6-608, was repealed in 1989 and replaced by the crime of gambling promotion, Tennessee Code Annotated section 39-17-503. The offense of gambling promotion is defined as follows:

A person commits an offense who knowingly induces or aids another to engage in gambling, and:

(1) Intends to derive or derives an economic benefit other than personal winnings from the gambling; or

(2) Participates in the gambling and has, other than by virtue of skill or luck, a lesser risk of losing or greater chance of winning than one (1) or more of the other participants.

[4]We note that the "length of sentence a defendant receives for an out-of-state conviction . . . is not determinative of what grade of felony the out-of-state offense might be assigned under Tennessee laws, and . . . may even be misleading." Vick, 2006 WL 722173, at *10.

Tenn. Code Ann. § 39-17-503(a). Gambling promotion is a Class B misdemeanor. Id. at (b). A person commits the offense of aggravated gambling promotion "who knowingly invests in, finances, owns, controls, supervises, manages or participates in a gambling enterprise." Id. § 39-17-504(a). For purposes of this offense, "'gambling enterprise' means two (2) or more persons regularly engaged in gambling promotion as defined in § 39-17-503." Id. at (b). Aggravated gambling promotion is a Class E felony. Id. at (c).

The requirement of two or more persons is not found in the Georgia statute. In Tennessee, without two or more persons regularly engaged in gambling promotion, the offense committed is not aggravated and is only a misdemeanor. We have no means of determining if the Defendant's convictions under the Georgia statute were based on actions which would have resulted in convictions under Tennessee Code Annotated section 39-17-504. See State v. Jerry W. Rodgers, No. W1999-01443-CCA-R3-CD, 2000 WL 1664263, at *5 (Tenn. Crim. App., Jackson, July 11, 2000). As such, the State failed to meet its burden of proof to establish the sentencing status of the Defendant.

We conclude that the trial court improperly classified and sentenced the Defendant as a Range III, persistent offender. Therefore, the judgment is reversed, and this case is remanded for resentencing.

III. Consecutive Sentencing

Next, the Defendant challenges the trial court's decision to order him to serve his bribery sentence consecutively to his federal sentence for distribution of information relating to destructive devices and aiding and abetting extortion. In this analysis, the trial court relied upon Rule 32(c)(2)[5] of the Tennessee Rules of Criminal Procedure, which states, in part, as follows:

> If the defendant has additional sentences or portions thereof to serve as a result of a conviction in other states or in federal court, the sentence imposed shall be consecutive thereto, unless the Court shall determine, in the exercise of its discretion, that good cause exists to run the sentences concurrently and explicitly so orders.

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[5]The Tennessee Rules of Criminal Procedure have been recently amended, said changes becoming effective July 1, 2006. See Compiler's Notes, Tenn. R. Crim. P. (2006). As part of this undertaking, numerous sections and/or subparts of various rules were renumbered. Rule 32(c)(2)(B) now provides as follows:

> If, as the result of conviction in another state or in federal court, the defendant has any additional sentence or portion thereof to serve, the court shall impose a sentence that is consecutive to any such unserved sentence unless the court determines in the exercise of its discretion that good cause exists to run the sentences concurrently and explicitly so orders.

However, the Defendant's crime in this case, as well as his sentencing, predate the effective date of this amendment to Rule 32. Therefore, we will cite to the provision as used by the trial court during sentencing and in effect at the time the instant crime was committed.

We conclude that the trial court properly applied Rule 32(c)(2). The "shall" language in Rule 32(c)(2) connotes a requirement that the Defendant's state and federal sentences run consecutively to each other, absent "good cause" to order otherwise. Furthermore, Rule 32(c)(2) places a finding of "good cause" solely within the discretion of the trial court. Here, the trial court made the following statements to support its finding that good cause did not exist to run the Defendant's federal and state sentences concurrently:

> And then I look at, and I think the most critical issue before the Court today, is determining how those punishments should run, how that incarceration should run. And [defense counsel's] argument is good in relation to I think if he was before the Court today charged simply with exactly the same thing he was convicted of in federal court, then I think that would be good cause for making the sentences concurrent, but I don't find he's before the Court for the same thing. He's charged with and has been found guilty in federal court for the possession and distribution of explosive devices and also a form of extortion, which are similar cases to what's before the Court.
>
> And I'm aware of the argument [defense counsel] makes about relevant conduct in federal court and how that can affect a sentence, I'm well aware of that, but it appears to me that he was found guilty of something that was different than what we have before the Court today in regard to this bribery charge. I do consider the bribery charge serious, I do consider it an attempt to get something for a criminal defendant when that criminal defendant maybe would have been entitled to it by tempering justice with mercy, but to try to do something to influence that is serious and I do think these are separate charges.
>
> And I look at Rule 32(c) of the Tennessee Rules of Criminal Procedure. And this Court has to follow the law and it appears to me that we have to follow the law in regard to this. If the [D]efendant has additional sentences, which [the Defendant] does, or portions to serve as a result of convictions in federal [c]ourt, the sentence imposed shall be consecutive unless the Court determines that good cause exists. As I said, I think good cause would be if we were before the Court today on exactly the same charges, I think that would be good cause. But we are before the Court on other things, there are other offenses for which he is found guilty.

The Defendant specifically contends that the trial court "was operating under the misapprehension that what the Defendant was convicted of in federal court differed in kind from his at-issue bribery conviction." The Defendant submits that the nature of the federal extortion conviction and the bribery of a public servant conviction at issue were the same "in kind." Finally, he states that "[t]he trial court . . . made it clear that, but for his misapprehension as to the nature of this federal crime, he would have considered good cause to exist to run the subject sentence concurrently thereto."

The Defendant pled guilty in federal court to distribution of information relating to destructive devices and aiding and abetting extortion and received a forty-eight-month sentence, followed by three years of supervised release. The extortion conviction was based upon charges that, on or about September 6, 2003, the Defendant

> did affect and attempt to affect interstate commerce by extortion, . . . by actively soliciting the agreement and cooperation of a public official, that is, a deputy clerk of the General Sessions Court of Hamilton County, Tennessee, who did unlawfully obtain a sum of money not due him or his office from the [D]efendant with the [D]efendant's consent under color of official right.

While similar in nature, these are not the same offenses. The bribery conviction results from events occurring on December 12, 2003, when the Defendant again bribed the deputy clerk of the General Sessions Court of Hamilton County. The Defendant states,

> To any argument that Judge Poole was merely drawing a distinction between the date of the state offense and that of the federal one:
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> Had his distinction been based on differing dates, he would simply have said so, and if he had understood that what he was calling 'a form of extortion' was in fact bribery, he wouldn't have brought up the explosives conviction. Nothing in what he says suggests that he thinks that 'a form of extortion' is a better candidate than possession and distribution of explosives for being the same crime as the state one. He tested both of the federal crimes—possession and distribution of explosives and 'a form of extortion' for such candidacy.

We conclude that this argument is without merit and that this was precisely the distinction the trial court was making. These convictions did not result from "exactly the same charges"—one offense occurred on September 6th and the other on December 12th. Moreover, we note that the Defendant's federal sentence included time for his distribution of information relating to destructive devices conviction—an offense that is not similar to bribery of a public servant.

Finally, in determining the length of the Defendant's sentence, the trial court commented on the positive factors—the Defendant's assistance to "youngsters" and community service—but also noted the Defendant's extensive criminal history and the fact that the Defendant was on probation when he committed the offense on appeal. See Tenn. Code Ann. § 40-35-115(b). The trial court found that the positive factors were outweighed by the Defendant's criminal history and the seriousness of the offense. The trial court then went on to determine that "good cause" did not exist for concurrent sentencing. The Defendant has failed to show that the trial court abused its discretion and is not entitled to relief on this issue. See State v. Marty W. Stanfill, No. M200-00022-CCA-MR3-CD, 2003 WL 41548, at *2 (Tenn. Crim. App., Nashville, Jan. 6, 2003). Therefore, we affirm the imposition of consecutive sentences.

IV. Eighth Amendment

Although not specifically raised as a separate issue, the Defendant has also complained that his sentence violates the constitutional prohibition against cruel and unusual punishment. The Defendant argues that this December 12th offense was considered by the federal court in imposing his sentence for distribution of information relating to destructive devices and aiding and abetting extortion. The Defendant's federal counsel testified he was provided discovery concerning the December 12th offense during prosecution of the federal charges, that "relevant conduct" could be considered by the federal court, and that he was "sure the federal government considered" this December 12th offense, among other things, in imposing an upward departure from the federal sentencing guidelines. The Defendant also noted that "the conduct giving rise to the present charges triggered a violation-of-probation on the Defendant's Georgia convictions[6] . . . . In sum, . . . the Defendant is facing potentially massive amounts of jail time out of this $200.00 ticket-fixing crime."

"The protection against cruel and unusual punishments afforded by the Eighth Amendment [to the United States Constitution] has defied precise delineation." Joseph G. Cook, Constitutional Rights of the Accused § 26:1, at 26-5 (3d ed. 1996). In particular, the United States Supreme Court case of Harmelin v. Michigan, 501 U.S. 957 (1991), reflects disagreement concerning the extent to which the Eighth Amendment guarantees "proportionality" in noncapital cases. See also State v. Harris, 844 S.W.2d 601, 602 (Tenn. 1992) (stating that "the precise contours of the federal proportionality guarantee are unclear"). Nevertheless, in Harris, the Tennessee Supreme Court noted that article I, section 16 of the Tennessee Constitution is subject to a more expansive interpretation than the Eighth Amendment to the Federal Constitution and, accordingly, held that the Tennessee Constitution mandates a proportionality inquiry, even in noncapital cases. Id. at 602-03.

In Harris, the Tennessee Supreme Court adopted a proportionality analysis by which courts initially compare the sentence imposed to the crime committed. Id. at 603 (citing Justice Kennedy's concurrence in Harmelin, 501 U.S. at 997-1009 (Kennedy, J., concurring in part and concurring in the judgment)). "Unless this threshold comparison leads to an inference of gross disproportionality, the inquiry ends—the sentence is constitutional." Id. "Determining whether a penalty for a particular offense raises an inference of gross disproportionality entails a comparison between the gravity of the offense and the harshness of the penalty." State v. Smith, 48 S.W.3d 159, 171 (Tenn. Crim. App. 2000) (citing Solem v. Helm, 463 U.S. 277, 290-91 (1983)). The factors relevant to the gravity of the offense include:

> (1) the nature of the crime, including whether society views the crime as serious or relatively minor and whether the crime is violent or non-violent; (2) the circumstances of the crime, including the culpability of the offender, as reflected by his intent and motive, and the magnitude of the crime; and (3) the existence and nature of any prior felonies if used to enhance the defendant's penalty.

[6] We note that it is unclear from the record whether the federal and Georgia sentences were to be served concurrently or consecutively to one another.

Id. (citing Solem, 463 U.S. at 291-97). "Factors relevant to the harshness of a penalty include the type of penalty imposed and, if a term of imprisonment, the length of the term and the availability of parole or other forms of early release." Id.

Briefly, we note that the Defendant's claim that the federal court previously considered the same bribery for upward departure on the extortion offense does not arise under the Eighth Amendment but under the Double Jeopardy Clause. Any double jeopardy argument on this ground in sentencing has been deemed meritless. See United States v. Luke Jones, No. 3:99CR264AHN, 2003WL 23653033, at *3 (D. Conn. Oct. 10, 2003).

Considering the Defendant's prior criminal convictions and his unsuccessful attempts at rehabilitation, the Defendant's sentence is not "grossly disproportionate" to his offense and, therefore, does not constitute cruel and unusual punishment. See Robert Gentry Galbreath v. State, No. M2003-02807-CCA-R3-PC, 2005 WL 119534, at *25 (Tenn. Crim. App., Nashville, Jan. 19, 2005). It is clear from the transcript of the guilty plea hearing that the Defendant was aware of the sentencing range for bribery of a public servant, a Class C felony—three to fifteen years depending on his range classification. Moreover, the imposition of consecutive sentencing is authorized in this case by Tennessee Rule of Criminal Procedure 32. See Wooten v. State, 477 S.W.2d 767, 768 (Tenn. Crim. App. 1971). Finally, any revocation of his probation in Georgia resulting from "the conduct giving rise to the present charges" is simply a consequence of the Defendant's continued criminal activity. The Defendant's sentence is merely a representation of the "State's interest 'in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law.'" Smith, 48 S.W.3d at 173 (quoting Rummele v. Estelle, 445 U.S. 263, 276 (1980) (holding a life sentence imposed after a third non-violent felony conviction did not violate the Eighth Amendment)). The Defendant's sentence is not unconstitutional.

CONCLUSION

In accordance with the foregoing reasoning and authorities, we conclude that the trial court did not err or abuse its discretion by ordering that the state sentence be served consecutively to the federal sentence. Moreover, the Defendant's sentence does not constitute cruel and unusual punishment. We do conclude, however, that the trial court improperly classified and sentenced the Defendant as a Range III, persistent offender. Therefore, we reverse the judgment of the trial court and remand the case for resentencing in accordance with this opinion.

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DAVID H. WELLES, JUDGE